No. 92-1671

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Petitioners,

v.

CROWN CORK & SEAL COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461, an employer (like respondent) that contributed to a multi-employer plan (like petitioner) is relieved of a statutory liability, called "withdrawal liability," if it (1) had a "binding agreement to withdraw" from the plan before September 26, 1980, and (2) effected a "complete withdrawal" from the plan by December 31, 1980. The statute further provides that a "complete withdrawal" takes place when the employer either "(1) permanently ceases to have an obligation to contribute under the plan, *or* (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (emphasis added).

The questions presented are:

(1) Whether, as both courts below and all but one other federal court have held, there is a "complete withdrawal" within the meaning of 29 U.S.C. § 1383(a)(2) when an employer ceases its normal business operations as part of a total shutdown, regardless of whether the test for a complete withdrawal under subsection (a)(1) is satisfied.

(2) Whether, as both courts below held on the specific facts of this case, respondent had a "binding agreement to withdraw" before September 26, 1980.

STATEMENT PURSUANT TO RULE 29.1

The following information is provided pursuant to this Court's Rule 29.1: Respondent Crown Cork & Seal Company, Inc. has eleven non-wholly-owned subsidiaries: Aluplata S.A.; Canmakers (Nigeria) Limited; Continental Can Hong Kong; Crown Cork Company (Belgium) N.V.; Crown Cork Company (Pvt) Limited; Crown Cork Company (Zambia) Limited; Crown Cork del Peru, S.A.; Crown Cork & Seal (Thailand) Co., Ltd.; Emirates Can Company, Ltd. (Dubai, UAE); The Crown Cork Company (East Africa) Ltd.; and The Crown Cork & Seal Company (Nigeria) Ltd.

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

The full facts and procedural history of this case, as well as the statutory scheme governing this case, are accurately stated in the opinion of the Third Circuit. Pet. App. 3a-9a. What follows is a summary of those matters.

1. *Facts.* In July of 1980, Harold Abrams, Director of Industrial Relations for respondent Crown Cork & Seal Company ("Crown"), sent a letter to each of the four unions that represented Crown's employees at its St. Louis plant to inform them that the company had made a final decision to close the plant. Meetings were held on several

subsequent occasions to negotiate the effects of the plant closing, but the company's decision was not challenged. Pet. App. 3a-4a.

Massive reductions in the work force at the St. Louis plant followed. As a result of layoffs, terminations, and transfers, "only 9 of Crown Cork's 29 management employees remained at the St. Louis Plant after September 26th; 44 of the 148 production and maintenance workers remained; of 12 clerical workers, only 4 remained." Pet. App. 4a.

In addition, plant managers were notified by mailgram on September 16, 1980, that the St. Louis plant would close at the end of business on September 26, and that all orders placed at the St. Louis plant should be switched to another point of manufacturing before then. Pet. App. 4a. "Finish-up" work, consisting of assembling remaining materials into cans, was performed up until October 10, 1980, and amounted to only 265 production line-hours, or only 5% of the line-hours worked in April 1980.

Even this finish-up production work ceased completely by October 10. Thereafter, "the only work performed at the St. Louis plant consisted of tasks incidental to the final closing of the plant; dismantling, maintenance, clean-up and disposal of equipment and property." *Id.* By December 31, 1980, "only three members of Local 688's production and maintenance unit and only one member of Local 688's clerical unit were still employed at the St. Louis Plant, performing shut down work." Pet. App. 5a.[1] The last of these employees was laid off on November 6, 1981. *Id.*

On September 23, 1980, Crown entered into a listing agreement with a real estate broker to sell the plant. Pet.

[1] The parties had "stipulated that the sole activities after October 10, 1980 were tasks performed by just four employees incidental to plant closing." Pet. App. 17a n.10.

App. 4a. The plant ultimately was sold on June 3, 1982. *Id.*

2. *The statutory scheme.* Multiemployer pension plans like petitioner are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. On September 26, 1980, Congress enacted the Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (codified in relevant part at 29 U.S.C. §§ 1381-1453). Under MPPAA, an employer that withdraws from a multiemployer fund becomes obligated to pay a share of the plan's unfunded vested benefits. This obligation is called "withdrawal liability."

As originally enacted, MPPAA had retroactive effect. *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 723 (1984). Although this Court held in the *Gray* case that MPPAA's retroactivity was constitutional, Congress nevertheless changed its mind on that point and subsequently amended MPPAA's effective date as part of the Deficit Reduction Act of 1984 ("DEFRA"), Pub. L. No. 98-369, 98 Stat. 494.[2]

Section 558 of DEFRA provides, *inter alia*, that an employer that had a "binding agreement to withdraw" from a plan before September 26, 1980 would be exempt from withdrawal liability, as long as a "complete withdrawal" from the plan took place before December 31, 1980. MPPAA defines a "complete withdrawal" from a multiemployer plan as occurring *either* when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all

[2] As explained by the court below, "[t]he Senate Finance Committee found that the retroactive application of MPPAA had an unduly burdensome effect on employers that withdrew between April and September, 1980 and was unnecessary to preserve the financial integrity of multiemployer plans." Pet. App. 9a (citing *Long Island Oil Prods. Co.* v. *Local 553 Pension Fund*, 775 F.2d 24, 27 (2d Cir. 1985)).

covered operations under the plan." 29 U.S.C. § 1383(a).[3] Because DEFRA's special, one-time-only exemption from withdrawal liability was granted only to employers who withdrew before December 31, 1980, it has no current vitality, and it is doubtful that there are any more cases pending under § 558.

3. *Opinions below.* Both courts below held that Crown is not responsible for any withdrawal liability based on its closing of the St. Louis plant. They held, on the specific facts of this case, that Crown had a binding agreement to withdraw from the plan on September 26, 1980; and that a complete withdrawal from the plan had occurred before December 31, 1980. The rationale for the latter part of the courts' holdings was that no "operations" took place at the St. Louis plant after October 10, 1980, when all production ceased. See Pet. App. 15a-18a. Although some employees performed clean-up and dismantling work after December 31, 1980, for which Crown continued to make contributions to the pension plan, that work was merely incidental to the shutdown, and did not constitute the normal operational or business activity of the facility. Therefore, the Court of Appeals held that this work did not constitute "operations" as that term is used in the statute, and that a "complete withdrawal" occurred before December 31, 1980, because Crown had "cease[d] its normal business operations in preparation for a shutdown." Pet. App. 3a.

SUMMARY OF ARGUMENT

1. Petitioner claims that there is a conflict between the holding of the Third Circuit in this case and that of the Seventh Circuit in *Trustees of Iron Workers Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989). The hold-

[3] Similarly, the date of a "complete withdrawal" is defined as "the date of the cessation of the obligation to contribute *or* the cessation of covered operations." 29 U.S.C. § 1383(e) (emphasis added).

ings of the two cases, however, on their very different facts, are not in conflict.

In this case, all production work had ceased prior to the date of the claimed withdrawal. The Third Circuit therefore focused on the correct definition of the term "operations" in § 1383(a)(2), which says that a complete withdrawal occurs when an employer "permanently ceases all covered operations." The Third Circuit ultimately held that when Crown's production, which constituted its normal business activity, ended, its "operations" ceased, and a complete withdrawal existed under the statute.

In *Allied Products*, on the other hand, actual production work continued beyond the date of the claimed complete withdrawal. Therefore, the definition of "operations" was irrelevant to that decision since no matter what "operations" might mean, it clearly included production work. As a result, the parties and court focused on the meaning of the word "all" in the phrase "permanently ceases all covered operations," rather than on the word "operations." The Seventh Circuit rejected the pension fund's argument and the holding of the district court, that "all" could be read as "virtually all." Hence, even though the amount of work was *de minimis*, the Seventh Circuit held that the statute's requirement of a cessation of "all" covered operations had to be read literally, and accordingly no withdrawal had occurred.

This Court reviews only direct, intolerable conflicts in the holdings of the courts of appeals. There is no such conflict here.

2. Even if the approaches of the Third and Seventh Circuits diverge, the practical consequences of this difference in opinion are likely to be insignificant at best. First of all, it takes a very special confluence of several factors to result in this type of dispute over withdrawal liability. The infrequency of that confluence is reflected in the fact that in the thirteen years since MPPAA was

passed, there have been only two federal appellate court cases (*Allied Products* and the instant case) and six district court cases dealing with the questions presented here. In fact, in view of the improbability that any more cases will be brought under § 558 of DEFRA, there will almost certainly be even fewer cases in the future. The infrequency with which these issues have been litigated belies petitioner's dire predictions of great confusion if this Court does not address these issues. Petitioner has advanced no reason why this Court must address these questions at this juncture, when there is no square conflict, rather than after their fuller consideration by other courts of appeals if these questions ever should arise again.

3. Although framed by petitioner as an issue about the Court of Appeals' approach to statutory construction, at bottom petitioner merely disagrees with the Third Circuit's conclusion as to the meaning of § 1383(a)(2). In fact, the decision of the Court of Appeals is supported by all the other federal court decisions on the question except for *Allied Products*, and was reached using settled principles of statutory construction. The Third Circuit's consideration of legislative history was routine and completely appropriate. The meaning of the statutory term "operations" is by no means self-evident; and the fact that all the other courts that have considered the question (except for the Seventh Circuit) have adopted the same interpretation of the term as the Third Circuit's substantially undermines petitioner's argument that the term unambiguously has a different meaning. Nor was there anything exceptional about the Third Circuit's failure to address the views expressed by the Pension Benefit Guaranty Corporation ("PBGC") in an *amicus* brief filed three years earlier in a different appeal, where the PBGC neither filed an *amicus* brief in this appeal nor even informed the Court of Appeals that it still adhered to its previously expressed views; where the PBGC had no rules or regulations on the subject; and where the PBGC has a history of taking inconsistent positions on this very issue.

4. Both the District Court and the Court of Appeals carefully considered the facts of this case and arrived at the same conclusion: that respondent had a "binding agreement to withdraw" from the plan before September 26, 1980. Petitioner has advanced no persuasive reason why this Court should review these facts and the conclusion reached, as to which the two lower courts were in agreement. Moreover, this issue under § 558 of DEFRA is unlikely to arise ever again, since that statute applied by its terms only to employer withdrawals that took place almost thirteen years ago.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT IN DECISIONS REQUIRING RESOLUTION BY THIS COURT.

The petition is based primarily on a supposed conflict between the decision of the Third Circuit in this case and that of the Seventh Circuit in *Trustees of Iron Workers Local 473 Pension Trust* v. *Allied Products Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847 (1989). An examination of the facts and holdings in the two cases, however, reveals that the Third Circuit has not "rendered a *decision* in conflict with the *decision* of another United States court of appeals on the same matter." Sup. Ct. R. 10.1(a) (emphasis added). Indeed, the Third Circuit itself distinguished *Allied Products* on its facts. See Pet. App. 17a n.10.

Under § 1383(a)(2), a complete withdrawal occurs when an employer ceases "all covered operations."[4] Because the appellate courts in *Allied Products* and this case were presented with different facts and different arguments concerning this provision, each court focused on a different aspect of this statutory test in its holding.

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[4] The statute provides two alternative tests for effecting a "complete withdrawal." The first, in § 1383(a)(1), depends on a cessation of the employer's obligation to contribute to the plan. Since contributions continued beyond the claimed withdrawal date in both this case and *Allied Products*, no argument was made in either case of a complete withdrawal under subsection (a)(1).

In *Allied Products*, the pension plan claimed that there had been a "complete withdrawal" under § 1383(a)(2) during the plan year ending June 30, 1983. Allied, the employer, claimed that its "complete withdrawal" from the plan did not occur until the next year, the plan year ending June 30, 1984. The critical fact in *Allied Products* was that regular production work, including manufacturing and the processing of purchase orders, was performed after the withdrawal date urged by the plan. As the Seventh Circuit noted, "Allied still received, processed and filled seven purchase orders during 1983." 872 F.2d at 209. The pension fund nevertheless argued that a complete withdrawal had taken place on the ground that the amount of work performed after its claimed withdrawal date was *de minimis*. The district court had accepted this argument and ruled that "it was sufficient if 'virtually all' (as opposed to 'all') covered operations came to a halt in order to trigger withdrawal liability." 872 F.2d at 212.

The Seventh Circuit disagreed, reasoning that "Congress meant 100 percent when it said 'all' " and therefore that "there simply is no other way to remain faithful to Congress' intent, as expressed by the statute's clear and unambiguous language, other than to hold that all (100 percent) of the covered operations must permanently cease before finding an employer has completely withdrawn from a multiemployer plan." *Id.* at 213. The Seventh Circuit held that a finding of a complete withdrawal during the plan year ending June 30, 1983, was precluded by the facts, among others, that "Allied's employees produced and shipped products to some of its primary customers even after [that date]" and "Allied also received several purchase orders after [that date]." *Id.* at 214.

In the instant case, by contrast, no production work at all was performed at the St. Louis plant beyond December 31, 1980, the date of the complete withdrawal claimed by Crown. The Third Circuit explicitly pointed

out this critical factual distinction (see Pet. App. 17a n.10) and, consistent with every other federal court decision on the question, held that under § 1383(a)(2) "an employer has completely withdrawn when it ceases its normal business operations in preparation for a shutdown." Pet. App. 3a.[5]

Thus, the Third Circuit in this case focused on the type of work that would constitute "operations"; held that such operations were the employer's normal business operations; and therefore did not have to consider a *de minimis* argument since no such operations took place after Crown's claimed withdrawal date. The Seventh Circuit in *Allied Products*, on the other hand, was presented with and rejected a *de minimis* argument, and did not have to define the scope of the term "operations," since it was clear that whatever "operations" might be, they certainly existed beyond the claimed withdrawal date in that case, albeit at reduced levels.

To be sure, the Seventh Circuit went beyond what was necessary to its holding and mused in a brief, conclusory footnote about the correct definition of "covered operations" within the meaning of § 1383(a)(2). In that dictum, it said that " 'covered operations' refers to those

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[5] Petitioner ignores this *holding* and instead attempts to focus attention on other language in the Third Circuit's opinion in order to persuade this Court that there is a conflict in decisions. The Third Circuit's reference, however, to the occurrence of a withdrawal upon a "substantial cessation of normal business operations" (quoted in Pet. at 10), came in the context of the court's description of the statute's legislative history. See Pet. App. 18a. It was not the court's holding. Indeed, only a few lines after the Third Circuit's description of the legislative history in the statement emphasized by petitioner, the Third Circuit reiterated its agreement with the holdings of other federal courts consistent with its holding (as stated at Pet. App. 3a), that "the performance of non-operational tasks incidental to a total closing of the facility does not prevent the court's finding that a complete withdrawal has occurred." Pet. App. 18a (emphasis added).

operations which are covered by the collective bargaining agreement . . . for which the employer must contribute to the pension plan." 872 F.2d at 214 n.10. Therefore, according to the Seventh Circuit, "the issue is whether bargaining unit work is being performed for which contributions are being made, not simply whether production work is being performed." *Id.*

This statement by the Seventh Circuit is at variance with the understanding of "operations" adopted by the Third Circuit in this case, as well as every other federal court that has interpreted the term. The Seventh Circuit's statement is dictum, however, since it was completely unnecessary to the decision in that case.[6]

This Court does not issue writs of certiorari to review differences in the opinions of courts of appeals, where those differences do not amount to square conflicts in the lower courts' decisions. See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196-97 (6th ed. 1986). "[T]here must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." *Id.* at 196 & n.22 (quoting Baker, *A Practical Guide to Certiorari*, 33 Cath. U. L. Rev. 611, 617 (1984)). Because of the factual differences between the Third and Seventh Circuit cases, the differing focuses of their opinions, and the fact that the Seventh Circuit's interpretation of the phrase "covered operations" is dictum, there is no such "intolerable" conflict here that would call for review by this Court.

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[6] It also was a completely non-analytical statement. It was not based on arguments of the parties, a consideration of legislative history, or the obvious problem that the definition it proposes makes the test for withdrawal set forth in § 1383(a)(2) redundant with the test in § 1383(a)(1). See p. 19, *infra*.

II. THIS ISSUE IS UNLIKELY TO ARISE FREQUENTLY, AND SO THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR THIS COURT TO RESOLVE.

Even if there were a sufficiently direct conflict to warrant this Court's attention, there are practical reasons for not granting the writ of certiorari. Petitioner claims that "[t]he problem created by this split is significant" (Pet. at 10); that "[t]he circumstances leading to this problem . . . are not rare" (Pet. at 11); and that "[t]his Court's guidance is urgently needed now." Pet. at 30. These statements are dramatic, but unfounded. In the nearly thirteen years since MPPAA was passed, the question of the meaning of the phrase "complete withdrawal" under § 1383(a) apparently has arisen in only two appellate cases (this one and *Allied Products*), and six district court cases.[7] One appellate court case every six or so years hardly presents the type of burning issue for federal courts, employers, or pension plans, that petitioner claims. And petitioner's claims of importance and urgency are further belied by the apparent absence of any new lawsuits concerning this provision in the last eight years.[8]

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[7] See *Speckman* v. *Barford Chevrolet Co.*, 535 F. Supp. 488 (E.D. Mo. 1982); *F.H. Cobb Co.* v. *New York State Teamsters Conf. Pension and Retirement Fund*, 584 F. Supp. 1181 (N.D.N.Y. 1984); *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 607 F. Supp. 570 (S.D.N.Y. 1985); *ILGWU Nat'l Retirement Fund* v. *Weatherall Fashions, Inc.*, No. 84-0772, 1986 WL 2757 (S.D. N.Y.); *Connors* v. *Economy Bldg. Systems, Inc.*, 651 F. Supp. 849 (D.D.C. 1986); *Combs* v. *Leishman*, 691 F. Supp. 424 (D.D.C. 1988).

[8] *Connors* v. *Economy Bldg. Systems, Inc.*, *supra*, apparently the most recently-filed lawsuit, was filed in 1985.

Moreover, of the eight cases that have dealt with the "complete withdrawal" issue, four involved disputes over the date of a complete withdrawal for purposes of claiming the total exemption from liability granted by DEFRA in limited circumstances. In that situation, employers had far more at stake and hence were more likely to litigate than in ordinary withdrawal liability disputes, which might or might not have involved differing amounts of with-

This Court generally does not grant certiorari when the issue, even if important and the subject of a true conflict of lower court decisions, is no longer a live one. See *Supreme Court Practice* § 4.4, at 200.

It is not surprising that there have been so few cases like this one. In order to have this particular dispute over the meaning of "complete withdrawal" come to the courts, a unique confluence of factors must be present. First, the employer must cease its normal operations but keep on some workers to perform tasks incidental to shutdown, like clean-up and maintenance. Second, the employer must use employees covered by the collective bargaining agreement, for whom contributions must be made, to perform those tasks, rather than hiring an outside cleaning or security service to perform them.[9] Third, the union employees who remain on the payroll must do so past the end of a plan year. Fourth, there must be a significant difference in the amount of withdrawal liability from one plan year to the next to trigger any real dispute.

Unless all of these factors are present, the issue of the correct date of a complete withdrawal will not be litigated. Thus, for the same reasons that the issue has come up

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drawal liability from one plan year to another, but did not involve total exemption from liability.

Since DEFRA cases thus were different from other withdrawal cases and can no longer be brought, those cases should not even be considered in assessing how frequently ordinary withdrawal liability cases have been brought and are likely to be brought in the future. Excluding the DEFRA cases, only one appellate case, *Allied Products*, and three district court cases have been brought in the last thirteen years.

[9] Indeed, in light of the Seventh Circuit's decision in *Allied Products*, it is unlikely that there will be occasions in the future in which this issue will come up, since employers who can benefit financially from an earlier withdrawal date can simply use outside workers rather than union employees for tasks incidental to shutdown.

infrequently in the past, it is unlikely to arise with any frequency in the future. In short, the issue is basically academic and does not call for this Court's review.

In any event, even if this issue were to arise again in the future, it would be beneficial to this Court to have the views of additional courts of appeals, both on the subject of whether a *de minimis* rule is appropriate and on the subject of the proper definition of "operations." This is especially true in view of the Seventh Circuit's cursory treatment of the "operations" issue and the fact that the Third Circuit did not focus on the *de minimis* question.[10]

If these are the critical, recurring issues that petitioner claims they are, this Court will have ample opportunity, on a fuller and more developed body of precedent, to address them. On the other hand, if, as history suggests, such problems are unusual and isolated, they simply are not worthy of review by this Court.[11]

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[10] Moreover, this would be an inappropriate case in which to consider the "complete withdrawal" issue in view of the facts that the Third Circuit's decision is in line with all the other federal court decisions, whereas *Allied Products* is the aberrant decision, and certiorari was denied in *Allied Products*.

[11] In *PBGC* v. *Gray*, *supra*, by contrast, the question of the constitutionality of the retroactive application of MPPAA's withdrawal liability provisions was "the subject of extensive nationwide litigation." *Shelter Framing Corp.* v. *PBGC*, 705 F.2d 1502, 1504 & n.2 (9th Cir. 1983) (partially listing cases). See also 467 U.S. at 728 n.7.

III. THE COURT OF APPEALS ADHERED TO THIS COURT'S SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION IN INTERPRETING SECTION 1383(a).

A. The Court of Appeals' Use of Legislative History Was Routine and Appropriate.

In its opinion below, the Court of Appeals announced no new principles of statutory construction. Instead, it engaged in a routine application of settled interpretive rules. While petitioner attempts to generate controversy over the application of the "plain meaning" rule, the Court of Appeals' use of legislative history was standard and entirely appropriate.[12] In any event, there is no issue here of sufficient importance to warrant review.

The Court of Appeals acted properly by examining the legislative history in the face of ambiguous statutory language. The term "covered operations" in § 1383(a)(2) is nowhere defined in ERISA. Nor is its meaning immediately clear on its face. The Court of Appeals accordingly held that the phrase is ambiguous. Pet. App. 18a.[13] It is, of course, one of the fundamental principles of statutory interpretation that "[w]here . . . a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language *and then to the legislative history* if the statutory language is unclear." *Blum* v. *Stenson*, 465 U.S. 886, 896 (1984)

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[12] Recent decisions by this Court have reinforced the long-settled principle that examination of legislative history is an important interpretive tool. See, e.g., *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1170-72 (1993) (Court looks to legislative history when interpreting RICO provision); *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647-50 (1990) (Court examines ERISA legislative history in order to ascertain congressional intent).

[13] Since every court that has addressed the meaning of "covered operations" (except the Seventh Circuit) has agreed with the Third Circuit's construction, petitioner's suggestion that the statute unambiguously means something else is difficult to fathom.

(emphasis added); see also *Patterson* v. *Shumate*, 112 S. Ct. 2242, 2248 (1992) (endorsing resort to legislative history to resolve statutory ambiguity).[14]

In addition to its finding of ambiguity, the court below noted that petitioner's interpretation of § 1383(a)(2) would lead to a statutory redundancy. See Pet. App. 16a n.9.[15] It follows that the court below had a duty to examine closely the intent of Congress so as to avoid the redundancy, or at least to justify it. As this Court has long recognized, a court engaged in statutory interpretation must give effect, if possible, to every word or clause. *Montclair* v. *Ramsdell*, 107 U.S. (17 Otto) 147, 152 (1883). Where the statute's terms appear to conflict or overlap, the court should explore the legislative history to ensure that the will of Congress is carried out. See *Watt* v. *Alaska*, 451 U.S. 259, 266-67 (1981).

Petitioner's further argument that the kind of legislative history relied upon by the Third Circuit was inherently unreliable, Pet. at 22-24, is completely baseless. The court below relied principally on the reports of two congressional commitees, the House Committee on Education and Labor and the Senate Committee on Labor and Human Resources. See Pet. App. 17a-18a. Contrary to petitioner's assertions, committee reports are the "most persuasive indicia of congressional intent in enacting a statute." 2A Singer, *Sutherland Statutory Construction* § 48.06, at 332 (5th ed. 1992). This Court has itself recognized the reliability of committee reports, "which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying

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[14] This Court has noted that it is particularly important to consider legislative history when interpreting labor statutes and similar statutes that represent a careful balancing of powerful competing interests and important national policies. *National Woodwork Mfrs. Assoc.* v. *NLRB*, 386 U.S. 612, 619 (1967).

[15] Indeed, petitioner concedes that its reading of § 1383(a)(2) may be redundant in light of § 1383(a)(1). Pet. at 20 n.16.

proposed legislation.' " *Garcia* v. *United States*, 469 U.S. 70, 76 (1984) (citations omitted). Far from committing error, the Court of Appeals was completely justified in examining these reports as part of its systematic inquiry into the intent of Congress.[16]

B. The Court of Appeals Was Not Obligated to Defer to an *Amicus* Brief Filed by the PBGC in a Different Appeal Years Earlier.

Petitioner argues that this Court should review the Court of Appeals' departure from the views expressed in an *amicus* brief filed by the PBGC three years ago, when this case was before the Court of Appeals on a different appeal. The Court of Appeals, however, broke no new ground in not deferring to this brief.

First, the PBGC brief so heavily relied upon by petitioner is not an agency rule or regulation, and does not merit the deference due those formally approved statements of position. See *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212 (1988) (refusing to apply principle of deference to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice").

Second, the PBGC did not file the brief in connection with this appeal. The brief was filed in 1989, and, as petitioner concedes, was only "provided the panel in this appeal through the joint appendix." Pet. at 21 n.17. The agency chose, for whatever reason, not to file a new brief when this case again reached the Court of Appeals in 1992.[17] Nor did the PBGC even reaffirm its old brief

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[16] Petitioner presents no evidence that any other congressional committee had a different understanding of what constitutes a cessation of operations.

[17] The Federal Rules of Appellate Procedure set out specific requirements for filing *amicus* briefs. See Fed. R. App. P. 29. Therefore, prospective *amici* certainly do not file a brief in one case and expect to receive consideration, let alone deference, from all courts hearing similar issues in the future.

through, for example, a letter to the court. Considering that no *amicus* brief was actually filed here, and considering the very real possibility that the views expressed in the earlier brief had grown stale, it is no wonder that the Court of Appeals chose not to defer to them. *Cf. Foremost-McKesson, Inc.* v. *Provident Securities Co.*, 423 U.S. 232, 259 (1976) (refusing to defer to SEC *amicus* brief and noting that brief was actually filed in different case).

Third, the position taken in the PBGC's brief is inconsistent with a prior position taken by the agency. As petitioner concedes, the PBGC once argued to another court that under ERISA, an employer who has reduced its participation in a fund to minimal levels may be found to have withdrawn from the plan. Pet. at 24-25; see *Solar* v. *PBGC*, 504 F. Supp. 1116, 1122-24 (S.D.N.Y.), *aff'd*, 666 F.2d 28 (2d Cir. 1981).[18] This Court has recognized that an inconsistent agency opinion "is entitled to considerably less deference than a consistently held agency view." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citations omitted).

Finally, deference to even an established agency position is appropriate only where the court, "employing traditional tools of statutory construction," finds that Congress did not speak to the disputed issue. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). Since the Court of Appeals found that Congress intended the term "covered operations" to refer to normal business activity, the court cor-

[18] *Solar* appears to have been the only case before the passage of MPPAA that concerned withdrawal liability. Even though the issue faced by the court and addressed by the PBGC in that case concerned pre-MPPAA withdrawal liability, the nature of the basic dispute was similar: the point at which an employer is deemed to have withdrawn from a multiemployer fund. The district court in *Solar* expressed concern that the PBGC's abrupt turnaround was a product of "new personnel" rather than considered statutory interpretation. 504 F. Supp. at 1123.

rectly chose not to consider the agency's old, contrary position.

C. The Court of Appeals Correctly Interpreted "Covered Operations" to Mean "Normal Business Activity."

Although framed as an argument over methods of statutory construction, at bottom petitioner merely disagrees with the Court of Appeals' conclusion as to the meaning of § 1383(a)(2). The Court of Appeals held that the term "covered operations" refers to the employer's "normal business operations." Pet. App. 3a. Thus, where an employer has ceased normal business activities but retains a handful of employees for clean-up, maintenance, security, or the like, the employer has "completely withdrawn" from the plan for purposes of § 1383(a)(2). This interpretation is the only construction that makes sense, effectuates the intent of Congress, and renders no statutory language superfluous.[19]

Petitioner argues, however, that "covered operations" means "operations that give rise to the obligation to con-

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[19] Indeed, the phrase "covered operations" is used elsewhere in ERISA, always to describe actual business activity. The phrase is found, for example, in 29 U.S.C. § 1461(h)(2), which voids withdrawal liability for any grocery wholesaler who "ceased all covered operations" and "relocated its operations to a new facility" and obtained all necessary permits with respect to "construction of and commencement of operations at the new facility" before September 26, 1980. In this provision, the term clearly refers to normal business activities, moved from one location to another.

The phrase is also used in 29 U.S.C. § 1397, which excuses employers who withdraw from multiemployer plans after the enactment of MPPAA from withdrawal liability allocable to work performed at facilities prior to September 26, 1980. At least one court of appeals has noted that, under § 1397, an employer might be exempt from withdrawal liability for a facility shut down prior to the enactment of MPPAA even if a few employees are retained there to wind down the operation. *Barbizon Corp.* v. *ILGWU National Retirement Fund*, 842 F.2d 627, 632 (2d Cir. 1988), *cert. denied*, 488 U.S. 967 (1988).

tribute to the plan." Pet. at 17. This interpretation, however, creates a redundancy, by obliterating the distinction between subsections 1383(a)(1) and (a)(2). "Complete withdrawal" would be defined only by the cessation of an obligation to contribute, and the "covered operations" language would effectively be read out of the statute.[20]

Petitioner's strained reading of § 1383(a) is at odds with the unmistakable intent of Congress. Sections 1383(a)(1) and (a)(2) are obviously not the same—they were written as separate provisions so as to encompass different factual circumstances. See *Garcia* v. *United States*, 469 U.S. 70, 73 (1984) (where clauses of statute are separated by conjunction "or," these terms are to be given "separate meanings"). An employer has withdrawn from a plan under MPPAA where it has *either* ceased to make contributions (for example, after the expiration of a collective bargaining agreement), *or* where it has ceased its normal business activity.[21]

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[20] Petitioner suggests (at 20 n.16) that § 1383(a)(2) is a "clarifying redundancy." Courts are obligated, however, to avoid redundancies where alternative, sensible interpretations exist. Petitioner also suggests that § 1383(a)(2) might cover a situation where an employer "may" be under an "obligation . . . to contribute should work ever resume at the facility . . . ." *Id.* It is hard to imagine the tortured scenario that petitioner has in mind, and it is virtually certain that Congress had no such scenario in mind when it enacted § 1383 with its two separate subsections.

[21] Petitioner points out that the term "covered work" is a term of art in labor caselaw which describes work performed under a collective bargaining agreement. Pet. at 19. But Congress did not use the term "covered work" in § 1383(a)(2); it used "covered operations." Presumably, the drafters of MPPAA could have used the term of art noted by petitioner had they chosen to do so. The Court of Appeals correctly interpreted the phrase that actually appears in the statute.

IV. THE COURT OF APPEALS CORRECTLY APPLIED SECTION 558 OF DEFRA TO THE SPECIFIC FACTS OF THIS CASE.

Petitioner briefly argues that the Court of Appeals incorrectly applied the part of § 558 of DEFRA that requires an employer to have had a "binding agreement to withdraw" before September 26, 1980, in order to be exempt from withdrawal liability.

The Court of Appeals' conclusion that § 558 was satisfied in this case was the result of a fact-specific inquiry which does not warrant further review. The opinion below adequately supported the conclusion of both courts below that Crown had a "binding agreement to withdraw" by the critical date. After finding the operative phrase ambiguous, Pet. App. 12a, the Court of Appeals examined expressions of congressional intent and concluded that the phrase refers to employers who have "effectively and irrevocably committed" to withdraw from a multiemployer plan. Pet. App. 13a-14a. The opinion goes on to describe carefully the various irrevocable commitments made by Crown before September 26, 1980, toward closure of its St. Louis plant, and agreed with the District Court that these actions "bound" Crown to withdraw as effectively as any contractual agreement. Pet. App. 14a. There is nothing remarkable about the application of the statute to the facts of this case by the courts below, and certainly nothing that warrants review by this Court.

Moreover, the meaning of the operative language of § 558 of DEFRA almost certainly will not recur in any cases in the future. That provision relieved employers of withdrawal liability only if they took the specified actions by the statutory deadlines in 1980. Any disputes over what took place nearly 13 years ago would have to have been litigated already, and will not recur. Thus, the issue is not a live one and need not take up this Court's time.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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